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No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

DR. JEAN E. SMITH, PETITIONER

76-1426

v.

LARRY CARTER, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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April 12, 1977

INDEX

OPINION BELOW 1

JURISDICTION 2

QUESTION PRESENTED 2

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

CONCLUSION 45

APPENDIX 47

CITATIONS

FEDERAL CASES

Afroyin v. Rusk
387 U.S. 253 (1967) 7

Baldwin v. Franks
120 U.S. 678 (1886) 11

Blackmer v. United States
284 U.S. 421 (1932) 39, 40

Blair v. United States
250 U.S. 273 (1919) 40

Carlisle v. United States
83 U.S. (16 Wall.) 147 (1875) 18

The Charming Betsy
6 U.S. (2 Cranch) 64 (1804) 17

Cook v. Tait
265 U.S. 47 (1924) 39

Crapo v. Kelly
83 U.S. (16 Wall.) 610 (1873) 18

The Francis
12 U.S. (8 Cranch) 383 (1814) 18

The Friendschaft
16 U.S. (3 Wheat.) 7 (1818) 17

Holmes v. Jennison
39 U.S. (14 Pet.) 540 (1840) 20

In re Griffiths
413 U.S. 717 (1973) 14

In re Ross
140 U.S. 453 (1891) 18

Kawakita v. United States
343 U.S. 717 (1951) 40

Kennedy v. Mendoza-Martinez
372 U.S. 144 (1963) 6

Lau Ow Bew v. United States
144 U.S. 47 (1892) 38

Livingston & Gilchrist v. Maryland Insurance Co.
11 U.S. (7 Cranch) 506 (1813) 11

Maley v. Shattuck
7 U.S. (3 Cranch) 458 (1806) 17

Murarka v. Bachrack Bros.
215 F.2d 547 (2d Cir.1954) 30

Nishikawa v. Dulles
356 U.S. 129 (1958) 6

Parker v. Overman
59 U.S. (18 How.) 137 (1855) 19

Perez v. Brownell
356 U.S. 44 (1958) 7

The Pizzaro
15 U.S. (2 Wheat.) 227 (1817).. 11,17,31

Radich v. Hutchins
95 U.S. 210 (1877) 18

Rogers v. Bellei
401 U.S. 815 (1971) 7, 21

Romero v. International Term. Co.
358 U.S. 354 (1959) 8

Rusk v. Cort
372 U.S. 144 (1963) 6

Schneider v. Rusk
377 U.S. 163 (1964) 6, 40

Steigleder v. McQuesten
198 U.S. 141 (1905) 19

Stifel v. Hopkins
477 F.2d 1116 (6th Cir.1973) 43

Sugarman v. Dougall
413 U.S. 634 (1973) 14

Trop v. Dulles
356 U.S. 86 (1958) 5, 6

6 U.N. Rep. Int'l Arb. Awards
173 (1955) 19

United States v. Bowman
260 U.S. 94 (1922) 40

United States v. Wiltberger
18 U.S. (5 Wheat.) 75 (1820) 45

United States v. Wong Kim Ark
169 U.S. 649 (1898) 21

Van Der Schelling v. U. S. News and World Report
213 F.Supp. 756 (E.D.Pa.1963), aff'd 324 F.2d 956, cert. denied, 377 U.S. 806 (1964) 5, 8

The Venus
12 U.S. (8 Cranch) 253 (1814) ... 11, 18

Wildes v. Parker
29 Fed.Cas. 1224, Cas. No. 17,652 (C.C.Mass.1839) 12, 13, 14

CANADA AND THE COMMONWEALTH

Arnerich v. The King
[1942] N.Z.L.R. 380 28

Calvin's Case
7 Co.Rep. 1 (1608) 21, 28

Jefferys v. Boosey
4 H.L. 815, 10 Eng.Rep. 681 (1854) 25, 26

Johnstone v. Pedlar
[1921] 2 A.C. 262 27

Joyce v. Director of Public Prosecution
[1946] A.C. 347, 1 All E.R. 186 (HL) 27

Low v. Routledge
1 C.A. 42 (1865) 25

Porter v. Freudenberg
1 [1915] K.B.D. 857 26

Rex v. Felton
33 W.L.R. 159, 9 Alta.L.R. 238 (1915) 26

Rex v. Neumann
[1949] 3 So.Afr.L.R. 1238 28

CONSTITUTIONAL PROVISIONS

U.S. Const. art. III, § 2 ..... 2, 9, 10, 13, 20

Delaware Const. (1792) 16

Georgia Const. (1789) 16

Massachusetts Const. (1780) 16, 17

New Hampshire Const. (1784) 16, 17

New Jersey Const. (1776) 17

New York Const. (1777) 17

Id. (1801) 16

Pennsylvania Const. (1776) 17

Id. (1790) 16

South Carolina Const. (1790) 16

Vermont Const. (1777) 17

STATUTES

Judiciary Code, 28 U.S.C. § 1332 ..... 5, 9, 10, 34, 38

28 U.S.C. § 1332(a) 2, 20

28 U.S.C. § 1332(a)(2) 2, 4

Act of March 3, 1875, 18 Stat. 470 ..... 34, 36

STATUTES (CANADA AND THE COMMONWEALTH)

British Nationality Act of 1948, 11 & 12 Geo. 6, c. 56 31

British Nationality Act of 1958, 6 & 7 Eliz. 2, c. 10 31

British Nationality Act of 1964, (1964, c. 22) 31

Canadian Citizenship Act, R.S., c. 33, s. 1 29

Statute of Westminister, 22 Geo. 5, c. 4 30

LEGISLATIVE HISTORY

Congressional Record, 43d Cong., 1st Sess. (1874) 35, 36

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BOOKS AND TREATISES

VI American and English Encyclopaedia of Law (2d ed. 1898) 38

XXVII American and English Encyclopaedia of Law (2d ed. 1898) 37

I Blackstone, Commentaries on the Laws of England (4th ed. 1771) 23, 23

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5 Butterworth, Words and Phrases Legally Defined (2d ed. 1970) 24

II Century Dictionary and Cyclopaedia (1889) 37

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8 Foreign Affairs Manual § 253.14 34

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7 Opinions of Attorneys General (1856) 15

Opinions of the Principal Executive Officers (1851) (see also H.R. Exec. Doc. No. 10, 32d Cong., 1st Sess [1851]) 32

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Stroud, Judicial Dictionary of Words and Phrases (3d ed. 1953) 24

Van Panhuys, Role of Nationality in International Law (1959) 16

II Vinogradoff, Outlines of Historical Jurisprudence (1922) 15

Webster, Dictionary of the English Language (1865) 37

5 Words and Phrases: Legal Maxims (Canada) (2d ed. 1965) 24

LAW REVIEW ARTICLES

Currie, "The Federal Courts and the American Law Institute," 36 U.Chi. L.Rev. 1 (1968) 42

Koessler,"'Subject', 'Citizen', 'National', and 'Permanent Allegiance'," 56 Yale L.J. 58 (1946-1947) 15

Warren, "New Light on the History of the Federal Judiciary Act of 1789," 37 Harv.L.Rev. 49 (1923) .. 41

IN THE SUPREME COURT OF THE UNITED STATES

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No._____

DR. JEAN E. SMITH, Petitioner,

v.

LARRY CARTER, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Dr. Jean E. Smith, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, entered January 20, 1977, which affirmed the judgment of the United States District Court for the Northern District of Mississippi.

OPINION BELOW

The opinion of the Court of Appeals is reported at 545 F.2d 909 (1977). (See Appendix, infra.)

JURISDICTION

The judgment of the Court of Appeals was entered January 20, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254

QUESTION PRESENTED

Whether a United States citizen who is a permanent resident of Canada, and who is considered a "subject" thereof by Canadian and Commonwealth case law, may invoke the diversity jurisdiction of a Federal District Court under 28 U.S.C. § 1332(a) to maintain a civil action for fraud against a citizen of the State of Mississippi.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Constitution, Article III, Section 2:

> "Section. 2. The judicial Power shall extend to all Cases * * * between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

28 U.S.C. § 1332(a)(2) provides:

> "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000 * * *, and is between * * * citizens of a State, and foreign states or citizens or subjects thereof."

STATEMENT OF THE CASE

Petitioner, Dr. Jean E. Smith, is a United States citizen and a permanent resident of Canada, where he is a professor at the University of Toronto. Dr. Smith resided in New Hampshire until 1965, when he moved to Toronto, Canada. In 1968, he achieved the academic rank of full professor with permanent tenure. In 1972, he became a "landed immigrant" of Canada, a necessary preliminary for becoming a Canadian citizen. Petitioner's family resides with him in their family dwelling in Toronto and, although he is ineligible to vote in Canada, petitioner has taken an active part in Canadian civic and political affairs.

Dr. Smith is a novice in the cattle business. In late 1973, he contracted with the respondent, a citizen of Mississippi and a recognized cattle expert, for 97 quality, bred heifers to establish a commercial cow-calf operation. The cattle proved to be severely infected with brucellosis (a contagious disease for which there is no known cure); and petitioner filed suit in the District Court for the Northern District of Mississippi against the respondent for fraudulent misrepresentation, requesting general and punitive damages.

On February 24, 1975, respondent moved to dismiss the complaint on the ground that petitioner was a U. S. citizen residing in Canada and that the requisite diversity of citizenship under 28 U.S.C. § 1332(a)(2) was lacking. On April 9, 1974, the District Court granted respondent's motion to dismiss, and petitioner appealed to the Court of

Appeals for the Fifth Circuit, which affirmed.

Both the District Court and the Court of Appeals based their opinions on the case of Van Der Schelling v. U. S. News & World Report, Inc., 213 F.Supp. 756 (E.D.Pa.1963), aff'd per curiam 324 F.2d 956 (3d Cir.1963), cert. denied, 377 U.S. 906 (1964), which held that a United States citizen who is a permanent resident of a foreign country may not invoke Federal diversity jurisdiction under 28 U.S.C. § 1332.

REASONS FOR GRANTING THE WRIT

In recent years this Court has moved to eliminate the second-class status of American citizens resident abroad. In a series of expatriation cases beginning with Trop v. Dulles, 356 U.S. 86 (1958), the Court has placed an American's citizenship beyond the reach of government to destroy. It has struck down Congressional enactment depriving Americans of their citizenship for desertion from

the military in wartime. ("Citizenship is not a license that expires on misbehavior," said Chief Justice Warren. [Trop v. Dulles, supra, at p. 92.]) It has held that a Japanese-American living in Japan in 1941 could not be stripped of his citizenship because he had been conscripted into the Japanese army. Nishikawa v. Dulles, 356 U.S. 129 (1958). It has ruled that Congress has no power to withdraw citizenship from native-born Americans who sought to evade the draft by fleeing to a foreign country, Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), or remaining in a foreign country, Rusk v. Cort, 372 U.S. 144 (1963). It has held that naturalized Americans residing in the country of their birth cannot be compelled to return periodically to the United States to retain their citizenship. As Mr. Justice Douglas said for the Court, "Living abroad * * * is no badge of lack of allegiance." Schneider

v. Rusk, 377 U.S. 163, 169 (1964). And in Afroyim v. Rusk, 387 U.S. 253 (1967), the Court held that an American residing abroad cannot lose his U.S. citizenship for voting in a foreign election (overruling Perez v. Brownell, 356 U.S. 44 [1958]). Though the case of "non-Fourteenth Amendment citizens" (neither born nor naturalized in the United States) remains distinguished as a result of Rogers v. Bellei, 401 U.S. 815 (1971), the fact is that the legal position of Americans abroad has been considerably enhanced during the past 19 years.

One area that still requires clarification is judicial standing in Federal courts for American citizens domiciled abroad. At the present time, a foreign citizen or a foreign corporation may bring suit in Federal court under diversity of citizenship, but the American citizen who resides in a foreign country cannot. This anomaly derives from

the rule set forth in Van Der Schelling v. U. S. News and World Report, 213 F.Supp. 756 (E.D.Pa.1963), aff'd per curiam, 324 F.2d 956 (3d Cir.1963), cert. denied, 377 U.S. 906 (1964) and followed by the Fifth Circuit in the present case. The fact is that the rule in the Van Der Schelling case contravenes Constitutional usage in 18th Century America, contradicts the unambiguous holdings of common law and the law of nations, ignores legislative history and judicial precedent and, as we show below, misinterprets the Constitution and the Congressional enactment pertaining to diversity.

The court below recognized "the anomaly of the existing rule under Van Der Schelling" but suggested that "Congress is the appropriate body" to change the law. 545 F.2d at 912. Such a statutory amendment, we maintain, is unnecessary. For, as Mr. Justice Frankfurter stated in Romero v. International

Term. Co., 358 U.S. 354, 380 (1959):

> "* * * if compelling reasons can be found for redefining the statute [Judiciary Act of 1875], if an ancient error cries out for rectification, we should now be deterred from applying new illuminations to the interpretation of past enactments."

Analysis must begin with Article III, Section 2, of the Constitution, which authorizes Federal jurisdiction in controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." Congressional implementation of this Article is contained in 28 U.S.C. § 1332, which provides:

> "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000 * * * and is between * * * citizens of a State, and foreign states or citizens or subjects thereof."

Since most U. S. citizens permanently domiciled abroad are not the citizens of a particular state, the precise question, in

terms of jurisdiction, is the meaning of the word "subjects" in Section 1332 of the United States Code, and in Article III, Section 2, of the Constitution, from which it derives. The construction of the trial court, affirmed by the Fifth Circuit, is that "citizens" and "subjects" are precise equivalents; that they do not establish separate categories; and that the difference pertains merely to the government under which one lives: "citizens" live in republics; "subjects" live in monarchies.

Petitioner respectfully suggests that the distinction between a citizen and a subject is scarcely so superficial; the terms have precise historical and legal meanings which have been recognized repeatedly. The term "citizen" connotes political rights and privileges; the term "subject", by contrast, relates to residence and domicile. The holdings of this Court make that distinction

abundantly clear:

> "* * * a person domiciled in a country, and enjoying the protection of its sovereign, is deemed a subject of that country." The Pizzaro, 15 U.S. (2 Wheat.) 227, 246 (1817).
>
> "* * * permanent residence constitutes a person a subject of the country where he is settled, so long as he continues to reside there." The Venus, 12 U.S. (8 Cranch) 253, 282 (1814).
>
> "If [a person] be settled bona fide in a country, with all the intention of indefinite residence, he is, as to all foreign countries, to be deemed a subject of that country." Livingston & Gilchrist v. Maryland Insurance Co., 11 U.S. (7 Cranch) 506, 542 (1813).

Conversely, insofar as the term citizen is concerned, the Court holds squarely that:

> "In the Constitution and the laws of the United States the word 'citizen' is generally, if not always, used in a political sense to designate one who has the rights and privileges of a citizen * * *." Baldwin v. Franks, 120 U.S. 678, 690 (1886).

The precise question of whether a United

States citizen, domiciled in a foreign country, is entitled to standing in Federal court came before Mr. Justice Story in Wildes v. Parker, 29 Fed.Cas. 1224, Case No. 17,652 (C.C. Mass.1839). And Justice Story, after indicating he believed such jurisdiction justified, requested the full Supreme Court to rule on the issue. According to the case note prepared by Charles Sumner, the court reporter (and later United States Senator from Massachusetts, 1851-74), the Supreme Court was divided. No decision was recorded, but the case "was afterwards proceeded with in the [United States] circuit court." 29 Fed.Cas. at 1226, note. The Supreme Court, though divided, permitted the case to remain under Federal jurisdiction.

As Mr. Justice Story observed:

> "The main question, therefore, in this case, is, whether * * * by 'foreign citizens or subjects', in the constitution, is meant such persons as are, either by nativity or by naturalization * * * foreign citizens or subjects, or whether it applies to those who are temporarily and at the time aliens, or foreign subjects for commercial purposes." Wildes v. Parker, 29 Fed.Cas. 1224, 1226 (C.C.Mass.1839).

The logical rigor of Mr. Justice Story's reply, combined with the subsequent determination of the Supreme Court to allow the case to proceed in Federal Court, strongly indicates that the words foreign "citizen" and "subject" as used in Article III, Section 2, include not only those who are foreign "by nativity or by naturalization", but also those who have acquired temporarily the national character of a foreign country by virtue of domicile.

As Mr. Justice Story noted:

> "It would be strange, if, in respect to all commercial transactions, an American citizen, domiciled

> in a foreign country, is to be treated as a foreign merchant and foreign subject, and yet if he sues on a commercial transaction, arising during his domicile abroad, he is to be deemed an American citizen. That would be to say, that he was a foreigner, as to all purposes, except of suits in the courts of the United States." 29 Fed.Cas. at 1226.

Throughout the years, the Court has continued to look on citizenship in the political nexus. Thus, in In re Griffiths, 413 U.S. 717 (1973), the Court struck down a Connecticut requirement demanding citizenship for admission to the bar. Mr. Justice Powell could find no "link between citizenship and the powers and responsibilities of a lawyer in Connecticut." 413 U.S. at 724. In Sugarman v. Dougall, 413 U.S. 634 (1973), Mr. Justice Blackmun defined the political nature of citizenship even more narrowly when he rejected New York's blanket citizenship requirement for permanent employment in the civil service. The point is that

the terms "citizen" and "subject" have precise meanings: "citizen" pertains to political rights and privileges; "subject" relates to residence and domicile.

The pertinent Opinion of Attorney General Caleb Cushing draws the distinction precisely. According to Cushing:

> "This distinction between citizens proper, that is the constituent members of political sovereignty, and subjects of that sovereignty, who are not therefore citizens, is recognized in the best authorities of public law." 7 Opinions of Attorneys General 746, 749 (1856) (emphasis in original).

Treatise and dictionary definitions, as well as such modern authorities as Sir Frederick Pollock,[1] Maximilian Koessler,[2] Sir John Salmond,[3] Sir Paul Vinogradoff,[4]

1. A First Book of Jurisprudence (6th ed. 1929), pp. 57-58.
2. "Subject", "Citizen", "National", and "Permanent Allegiance", 56 Yale L.J. 58, 63 (1946-1947).
3. Jurisprudence (7th ed. 1924), pp. 146-147.
4. II Outlines of Historical Jurisprudence (1922), pp. 116-117.

John Bassett Moore,[5] Green Hackworth,[6] Charles Chaney Hyde[7] and H. F. Van Panhuys[8] likewise distinguish between "citizen" and "subject". Citizen relates to political status--to rights and privileges; subject pertains to civil status--to residence and domicile, i.e., to all persons amenable to the laws.

The republican constitutions framed in revolutionary America employ the same distinction. "Citizen" is used exclusively to describe political participation and privileges (Massachusetts, 1780; New Hampshire, 1784; Georgia, 1789; Pennsylvania, 1790; South Carolina, 1790; Delaware, 1792; and New York, 1801). "Subject" is used

5. I Digest of International Law (1906), pp. 33, 273.
6. III Digest of International Law (1942), p. 1.
7. II International Law Chiefly as Interpreted By The United States (rev.ed. 1945), pp. 1066-67, note 6.
8. Role of Nationality in International Law (1959), pp. 28-29.

in a much broader sense to describe those amenable to the laws (Pennsylvania, 1776; New Jersey, 1776; Vermont, 1777; New York, 1777; Massachusetts, 1780; and New Hampshire, 1784).

It is equally clear that "subject" relates not merely to those who owe permanent allegiance to their government (as a citizen does), but to aliens resident within the country as well. They are subjects temporarily and by local allegiance. The doctrine has been applied by this Court to hold an American citizen resident in the Virgin Islands to be a Danish subject (The Charming Betsy, 6 U.S. (2 Cranch) 64 [1804]; Maley v. Shattuck, 7 U.S. (3 Cranch) 458 [1806]); to hold British citizens resident in Spain to be Spanish subjects (The Pizzaro, supra), or resident in Portugal to be Portuguese subjects (The Friendschaft, 16 U.S. (3 Wheat.) 7 [1818]); and to hold American

citizens resident in Britain to be British subjects (The Venus, supra; The Francis, 12 U.S. (8 Cranch) 383 [1814]). This doctrine was most clearly stated by Mr. Justice Field in Carlisle v. United States, 83 U.S. (16 Wall.) 147 (1873); Radich v. Hutchins, 95 U.S. 210 (1877); and Crapo v. Kelly, 83 U.S. (16 Wall.) 610 (1873). According to Justice Field:

> "All persons who are found within the limits of a government, whether their residence is permanent or temporary, are deemed subjects thereof." 83 U.S. at 643 (emphasis added).

The same doctrine is applied by analogy to alien seamen; they assume the national character of the flag under which they serve. In re Ross, 140 U.S. 453 (1891). More recently, it has been applied by an International Arbitration Commission to hold persons moving from the United States to Canada to be British (Canadian) subjects

purely as a result of that move. 6 United Nations Reports of International Arbitral Awards 173 (1955).

Similarly, as Mr. Justice Grier made clear when delivering the unanimous opinion of the Court in Parker v. Overman, 59 U.S. (18 How.) 137, 141 (1855), "'Citizenship' and 'residence' are not synonymous terms * * *." Mr. Justice Harlan was equally emphatic speaking for the Court in Steigleder v. McQuesten, 198 U.S. 141, 143 (1905):

> "It has long been settled that residence and citizenship are wholly different things within the meaning of the Constitution * * *."

Professor Edwin Borchard, formerly Assistant Solicitor of the Department of State, summarizes the distinction in The Diplomatic Protection of Citizens Abroad. According to Professor Borchard (at page 8):

> "The subjects of a state are all

> those persons over whom it exercises sovereignty, which in constitutional law include not merely citizens, but aliens residing within its territory or otherwise subject to its control."

Borchard dismisses the facile distinction relied on by the lower court. We should not "be detained," he states, "by any supposed difference between the terms 'subject' and 'citizen', the former applying * * * to a monarchy, the latter--where there is no kingship." (Id. at 21, emphasis added.)

It is important to recognize that the terms (foreign) "citizens" or "subject" used in 28 U.S.C. § 1332(a) derive from Article III, Section 2 of the Constitution, a document in which, as Chief Justice Taney observed: "No word was unnecessarily used or needlessly added. * * * Every word appears to have been weighed with utmost deliberation, and its force and effect have been fully understood." Holmes v. Jennison, 39 U.S. (14 Pet.) 540,

571 (1840).

In this respect it should be noted that the words "citizens" and "subjects" had distinct meaning in the common law. And Mr. Justice Gray noted in United States v. Wong Kim Ark, 169 U.S. 649, 654 (1898), in this respect the Constitution "must be interpreted in light of the common law, the principle and history of which was familiarly known to the framers of the Constitution." Or, as Mr. Justice Blackmun noted recently, "our law in this area follows English concepts." Rogers v. Bellei, supra, at p. 829.

And the holdings of the common law on this point are clear, for the unambiguous line of precedent--tracing to Lord Coke in Calvin's Case, 7 Co.Rep. 1 (1608)--holds that an alien resident is a "subject" of the place where he resides. The general rule, as enunciated by Lord Coke, is that protection and obedience are reciprocal; and the

"local protection" afforded an alien "on the King's part" makes the alien a subject to that extent.

The decision in Calvin's Case was reaffirmed by Lord Chief Justice Sir John Kelyng at Kel. J. 38, 84 E.R. 1071 (1668). Said the Lord Chief Justice, "it was agreed by us all [on the King's bench], that if an alien as he liveth here he is a subject of this realm * * *." (Emphasis added.)

Similarly, Lord Hale, who succeeded Sir John as Lord Chief Justice, held that, "Though the statute speaks of the king's subjects, it extends to aliens, * * * for though they are not the king's natural born subjects, they are the king's subjects when in England by a local allegiance." I Pleas of the Crown 542 (1st ed. 1736).

The common law was restated by Blackstone in his Commentaries on the Laws of England, a standard work for the lawyers

attending the Constitutional Convention. Blackstone defined allegiance ("both express and implied") as two sorts:

> "* * * the one natural, the other local; the former being also perpetual, the latter temporary."

Natural allegiance, said Blackstone, was that due from those "born within the king's dominion."

> "Local allegiance is such as is due from an alien, or stranger born, for so long as he continues within the king's dominion and protection."

But regardless of the type, natural or local, "allegiance is a debt due from the subject, upon an implied contract with the prince, that so as the one affords protection, so long the other will demean himself faithfully." I Blackstone, Commentaries (4th ed. 1771), pp. 369-371.

The issue seems particularly clear in the case of Americans domiciled in Canada (or other countries in the British Common-

wealth). The courts of Canada and the Commonwealth have consistently held that an alien friend is a subject of the Crown. Thus, Words and Phrases: Legal Maxims (Canada), Vol. 5 (2d ed. 1965), p. 253, states, "* * * the expression 'H.M.'s subjects' * * * includes all persons subject to the laws whether included in the term 'British subjects' in its narrow acceptation, as a natural born or naturalized subject or not."

Butterworth's Words & Phrases Legally Defined, Vol. 5 (2d ed. 1970), p. 133, similarly states that "* * * anyone who, for the time being, owes allegiance to the Sovereign and enjoys his protection, is fairly described as a subject of the Sovereign, so long as the duty of allegiance and the right to protection exist." Stroud's Judicial Dictionary of Words and Phrases (3d ed. 1953), p. 2889, holds, "An alien ami may be a 'subject' of the Sovereign."

The general rule is stated by Sir John Salmond, late Justice of the Supreme Court of New Zealand, who records that the term "subject", "* * * includes all members of the body politic, whether they are citizens (i.e., subjects stricto sensu) or resident aliens. All such persons are subjects, as being subject to the power of the state and to its jurisdiction, and as owing to it, at least temporarily, fidelity and obedience." Jurisprudence (7th ed. 1924), pp. 146-147 h.

The House of Lords considered the matter in Jefferys v. Boosey, 4 H.L. 815, 10 Eng.Rep. 681 (1854), and it was held by Lord Chief Baron Pollock that:

> "An alien residing here owes a temporary allegiance to, and while residing, is one of her Majesty's subjects; he owes obedience to the law, and is therefore entitled to the benefit of it * * *." 4 H.L. at 939.

A similar case arising in Canada came before Chancery Appeals in Low v. Routledge,

1 C.A. 42 (1865); and it was held, citing the opinion of the Law Lords in Jefferys v. Boosey, supra, that, "Every alien coming into a British colony becomes temporarily a subject of the Crown--bound by, subject to, and entitled to the benefit of the laws which affect all British subjects." 1 C.A. at 47.

The leading Canadian case, however, is Rex v. Felton, 33 W.L.R. 159, 9 Alta. L.R. 238 (1915), in which the Alberta Supreme Court held that the expression "His Majesty's subjects", "* * * includes all persons subject to the laws whether included in the term British subject in its narrow acceptance or not." 9 Alta.L.R. at 243.

The primacy of domicile over citizenship in determining national character was reaffirmed in 1915 by the Court of Appeal in Porter v. Freudenberg, 1 [1915] K.B.D. 857. To determine otherwise, said the court, "* * * we must contradict all modern authori-

ties upon this subject." 1 [1915] K.B.D. at 872.

In Johnstone v. Pedlar, 2 [1921] A.C. 262, the House of Lords reaffirmed the status of a foreign friend living within the realm when held that a United States citizen resident in Ireland was to be treated as a subject, not an alien. The doctrine was forcefully restated by Viscount Findlay: "An alien in British territory is normally regarded as a British subject for the time being in virtue of local allegiance." 2 [1921] A.C. at 272.

Similarly, in the celebrated case of "Lord Haw Haw" (Joyce v. Director of Public Prosecutions, [1946] A.C. 347 (House of Lords), 1 All E.R. 186), the House of Lords upheld the conviction for treason of an American citizen by birth who had lived for many years in Great Britain but had never become naturalized. Citing the decision of Lord Coke in

Calvin's Case: "protectio trahit subjectionem et subjectio protectionem" (see p. 21 infra), the Law Lords held that, "All who were brought within the King's protection were ad fidem regis: all owed him allegiance." 1 All E.R. at 189.

In Rex v. Neumann, 3 [1949] S.A.L.R. 1238, the Union of South Africa likewise sustained the trial for high treason of a German citizen domiciled in the Transvaal. Mr. Justice Murray hinged the Court's decision on "'the natural and faithful obedience which every subject owes to the Supreme Magistrate who oversteps not his prerogatives. It is either natural and perpetual, where one is a subject born or has been naturalized; or local and temporary, where one is merely resident in the British Dominions.'" 3 [1949] S.A.L.R. at 1264 (emphasis added).

New Zealand applies the same rule. In Arnerich v. The King, [1942] N.Z.L.R. 380,

the New Zealand Supreme Court held an alien resident to be a subject of the Crown. Mr. Justice Callan, who considered the matter in detail, states unequivocally that:

> "In my view, any one who, for the time being, owes allegiance to the Sovereign and enjoys his protection, is fairly described as a subject of the Sovereign, so long as the duty of allegiance and the right of protection exist." [1942] N.Z.L.R. at 390.

In brief, the House of Lords, Chancery Appeals, King's Bench, as well as Supreme Courts in Australia, New Zealand, South Africa and Canada hold in a continued line of precedent that an alien resident is a subject of the Crown.

Conversely, an individual in Canada who enjoys full political privileges is defined by statute as a "Canadian citizen" (Canadian Citizenship Act, R.S., c. 33, s.1.). All Canadian citizens are subjects, but not all Canadian subjects may be citizens.

Americans who reside in Canada are Canadian subjects according to unequivocal determination by the courts responsible, supra. But they are not "Canadian citizens"--a term defining political status, not civil. And as Mr. Justice Harlan (while Judge of the United States Court of Appeals for the Second Circuit) stated in Murarka v. Bachrack Bros., 215 F.2d 547, 553 (2d Cir.1954):

> "It is the undoubted right of each country to determine who are its nationals, and it seems to be general international usage that such a determination will usually be accepted by other nations."

Finally, it should be pointed out that Canada is a monarchy, ruled over by Her Majesty, Queen Elizabeth II, and an independent nation ever since the Statute of Westminster, December 11, 1931 (22 Geo.5, chap. 4). Yet those Canadians enjoying full political privileges are defined by statute (supra) as "citizens". Similarly, in Great Britain, the British

Nationality Acts of 1948 (11 & 12 Geo. 6, c. 56), 1958 (6 & 7 Eliz. 2, c. 10), and 1964 (1964, c. 22), speak in terms of a "citizen of the United Kingdom and Colonies" when alluding to full privileges of membership in that State. This further suggests that the interpretation that citizens live in republics and subjects in monarchies is simply incorrect.

The judicial holdings of the United States (and the Commonwealth) are reflected in the decisions of the Executive Branch. In 1817, Attorney General Richard Rush appeared in argument before this Court in The Pizzaro, supra, with a clear pronouncement that insofar as the United States was concerned, domicile determined national character. According to Rush, the word "subjects", as used in the 1875 treaty with Spain, meant "inhabitants" and was "equally applicable to the residents of both countries." 15 U.S. (2 Wheat.) at

238.

Secretary of State Daniel Webster issued a similar finding in his report on "Thrasher's Case", submitted by the President to Congress, December 23, 1851. Said Webster:

> "The Supreme Court of the United States has decided 'that a person who removes to a foreign country, settles himself there and engages in trade of the country, furnishes by these acts such evidence of an intention permanently to reside in that country as to stamp him with its national character [The Venus, 12 U.S. (8 Cranch) 253, 279 (1814],' and this undoubtedly is in full accord with the sentiments of the most eminent writers as well as those of other high judicial tribunals on the subject." Opinions of the Principal Executive Officers 22 (1851).

The import of the statements of Rush and Webster is that Americans permanently domiciled abroad frequently forfeit the protection of the United States government. Though still United States citizens, they are considered to be subjects of the country where they reside; and the Department of

State will not intervene vis-a-vis the host government to protect them. The decisions of Secretaries of State to refuse diplomatic protection to such persons extends to John C. Calhoun, James Buchanan, Webster, William Learned Marcy, William H. Seward and their successors. According to Seward, American citizens "temporarily traveling or sojourning" abroad were entitled to United States protection, but United States citizens permanently domiciled in foreign countries were not:

> "The principle upon which this decision rests is that protection and allegiance are reciprocal; that the citizen of the United States who becomes domiciliated in another country, contributing his labor, talents or wealth, to support of society there, becomes practically a member of the political state existing there, and for the time withdraws himself from the duties of citizenship here, and consents to waive the reciprocal right of protection from his own government." MS. Inst. Columbia 8.

This doctrine continues to prevail. Though

still United States citizens, such persons are considered to have become subjects of the country where they reside; and the Department of State often will not intervene to protect them. 8 Foreign Affairs Manual 250.1, 253.14.

The legislative history of Section 1332, Title 28, U.S. Code, likewise supports the belief that [foreign] "citizens" or "subjects" constitute two distinct categories of persons entitled to Federal access. The present statutory language traces to the Act of March 3, 1875, 18 Stat. 470, which expanded Federal diversity jurisdiction. The original House bill, H.R. 3195, which was limited in scope and aimed merely at "regulating the removal of causes from state courts to the circuit courts of the United States," used the term "alien" to refer to persons abroad entitled to diversity jurisdiction. But the Senate substitute which was far more encompassing than the House bill,

returned to the original language of the Constitution. (The text of the Senate substitute is reprinted at page 4979, Congressional Record, 43d Cong., 1st Sess.)

The purpose of the Senate substitute was made explicit in floor debate by Senator Carpenter of Wisconsin, the measure's sponsor--namely, to expand the Federal judicial power to the full grant authorized by the Constitution. According to Senator Carpenter, "The act of 1789 did not confer the whole power which the Constitution conferred; it did not do what the Supreme Court said it ought to do; it did not perform what the Supreme Court has declared to be the duty of Congress. This bill does."

In particular, Senator Carpenter referred to the expanded diversity jurisdiction permitted by the bill and found it consistent with the changed times of 1874. "We are a roving, travelling people," said Sena-

tor Carpenter, and these changes necessitated a change in legislation pertaining to Federal jurisdiction. Congressional Record, 43d Cong., 1st Sess., p. 4986.

The Senate substitute passed June 15, 1874. It was referred to conference committee March 1, 1875; and the report of conference agreed to by both the House and the Senate on March 3, 1875, and signed into law that same day. No changes were made in the original Senate text concerning Federal diversity jurisdiction--which was explicitly expanded to its full Constitutional reach. See Congressional Record, 43d Cong., 2d Sess., pp. 1992, 2168, 2240 and 2275.

The language of Section 1 of the Act of March 3, 1875, remained substantially unchanged until the revision of the Judicial Code in 1948, when it took its present form.

Again, it is appropriate to inquire as to the precise meaning of "subject" and

"citizen" in 1875. And in this connection, there is no reason to assume that by adopting those terms, the Congress intended anything other than their traditional common law meanings. The 1865 edition of Webster's Dictionary of the English Language defines "citizen" in terms of political and civil rights and "subject" in terms of being amenable to the laws (at pages 234 and 1315, respectively). The Century Dictionary and Cyclopedia, 12 volumes, published shortly afterwards, specifies a similar usage (at Vol. II, p. 1018, and Vol. IX, p. 6020 [1889]). The highly respected American and English Encyclopedia of Law, a basic legal reference of the period, states unequivocally that, "The term 'subject' refers to one who owes obedience to the laws." (Vol. XXVII, p. 193.) By contrast, "A citizen is one who, by birth or naturalization, or otherwise, is a member of a political society * * *."

(Vol. VI, p. 15.) (2d ed. 1898)

In summary, the legislative history of Section 1332, Title 28, U. S. Code, gives no suggestion or indication that the term "citizens" applied to residents of republics and "subjects" to those living in monarchies. To the contrary, it provides every indication that "subject" and "citizen" were used in their traditional common law context. A citizen enjoys full political rights and privileges; a subject includes all those amenable to the laws. And as Chief Justice Fuller said for the Court in Lau Ow Bew v. United States, 144 U.S. 47, 59 (1892):

> "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion."

If the decision below is allowed to stand, and if it is held that United States citizens domiciled abroad (who are treated

as foreign subjects for all commercial purposes by the law of nations and by the U.S. State Department) do not enjoy standing in the Federal courts, then we have reached an anomalous--indeed, an outrageous--situation where a foreign citizen or foreign corporation has access to the United States courts but the United States citizen who is a foreign subject does not.

Indeed, to deny American citizens domiciled abroad access to the Federal courts while sustaining diversity jurisdiction for Americans at home raises an important issue of due process. As Chief Justice Hughes pointed out in Blackmer v. United States, 284 U.S. 421, 436-438 (1932), the obligations of citizenship impose numerous duties on the citizen who is resident abroad. He must pay the national income tax, Cook v. Tait, 265 U.S. 47, 54, 56 (1924); indeed, if properly summoned, he must attend its

courts and give his testimony, Blair v. United States, 250 U.S. 273, 281 (1919). He may even be punished by the courts of the United States for his conduct abroad, United States v. Bowman, 260 U.S. 94, 102 (1922), including treason, Kawakita v. United States, 343 U.S. 717 (1951). "Nor can it be doubted that the United States possesses the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it, and to penalize him for refusal." Blackmer v. United States, supra, at p. 437.

Clearly, this is a question pertaining to the equal protection of the laws; and as Mr. Justice Douglas stated in Schneider v. Rusk, 377 U.S. at 168:

> "* * * while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.' Bolling v. Sharpe, 347 U.S. 497, 499 * * *."

According to the late Professor Charles Warren[9]:

> "The chief and only reason for * * * diversity of citizenship jurisdiction was to afford a tribunal * * * free from the local prejudices or passions which might prevail in State Court against foreigners or non-citizens [of the State]. The Federal Court was to secure to a non-citizen [of the State] the application of the same law which a State Court would give to its own citizens, and to see that within a State there should be no discrimination against non-citizens [of the State] in the application of justice. There is not a trace of any other purpose than the above to be found in any of the arguments made in 1787-1789 as to this jurisdiction." 37 Harv. L.Rev. at 83.

Professor James W. Moore, after pointing out the anomaly of the holding denying Federal access to United States citizens resident abroad, states that:

> "The policies supporting the exercise of diversity jurisdiction, as well as the necessary federal element, would seem to be involved in any case in which the adverse parties are not residents of the same state, even though one party is a United

9. Warren, "New Light on the History of the Federal Judiciary Act of 1789," 37 Harv.L. Rev. 49 (1923).

> States citizen domiciled in a foreign country or is not otherwise a citizen of any state or foreign country." 1 Moore's Federal Practice ¶ 0.74[4], at 708.4 (2d ed. 1974).

Similarly, Professor David P. Currie, who is likewise critical, maintains that, "diversity policy would warrant jurisdiction on foreign relations grounds whenever one or more of the parties is claimed as a national by a foreign country, and on grounds of bias whenever one party is an American citizen or resident and the other is not * * *." For, as Currie states, "if the dangers of local prejudice justifies jurisdiction over Americans living in other states, it surely applies to the stateless and expatriate." The Federal Courts and the American Law Institute, 36 U.Chi.L.R. 1, 9 (1968).

Professor Herbert Wechsler, after restating what purports to be the current law, quizically asks his readers, "Is this

the result compelled by Article III?" Hart & Wechsler, The Federal Courts and the Federal System 1061 (2d ed.1973). Professor Charles Wright, who appears equally skeptical, observes that disputes involving Americans abroad "seem to follow within the natural ambit of diversity and alienage jurisdiction." According to Wright:

> "The purpose of diversity jurisdiction is said to protect an out-of-state litigant from prejudice if he is forced to litigate away from home. Certainly an American domiciled abroad is as likely to be considered as much a stranger to a state forum as is an individual domiciled in a neighboring state." 13 Wright, Miller & Cooper, Federal Practice and Procedure § 3621, at 758-759 (1975).

Indeed, after an extensive review of the purposes of Federal diversity jurisdiction in relation to the guarantees of due process, the Sixth Circuit, in Stifel v. Hopkins, 477 F.2d 1116 (6th Cir.1973), concluded that, "We ought to be hesitant to

define a cognizable class of citizens out of access to the federal courts, which are, after all, the courts of the sovereign to which that class of citizens belongs."

Today, more than ever, this guarantee of fairness provided by the Federal courts is essential. The growth of the multinational corporation, the expansion of America's role is world affairs and the concommitant employment abroad of thousands of Americans who remain loyal to the land of their birth, who pay taxes to the United States, who serve as unofficial ambassadors abroad while making a contribution both to their host country and to the United States, scarcely warrants a finding which could deny them Federal access--and the fairness which this implies. Surely it is neither in the national interest of the United States, nor in the intent of the Framers of the Constitution, to deprive Americans abroad of the protection of the United

States courts, or, as an alternative, to force them to flee to foreign citizenship to gain such access.

The words foreign "citizen" and foreign "subject", as used in Article III, Section 2, of the Constitution, are clear and precise. They meant different categories of persons in 1787; they mean different categories today. And as Chief Justice John Marshall observed in United States v. Wiltberger, 18 U.S. (5 Wheat.) 75, 96 (1820), "The case must be a strong one indeed, in departing from the plain meaning of the words * * * in search of an intention which the words themselves did not suggest."

CONCLUSION

For the reasons stated, this writ should be granted and the judgment of the

Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

NORMAN SEPENUK
FRED M. BUSH, JR.

Norman Sepenuk
Of Attorneys for Petitioner

Dr. Jean E. SMITH, Plaintiff-Appellant-Cross Appellee,

v.

Larry CARTER, Defendant-Appellee-Cross Appellant.

No. 75-2087.

United States Court of Appeals, Fifth Circuit.

Jan. 20, 1977.

The United States District Court for the Northern District of Mississippi, William C. Keady, Chief Judge, dismissed diversity action on ground that requisite diversity was lacking and remanded original replevin action to state court, and cross appeals were taken. The Court of Appeals, James C. Hill, Circuit Judge, held that plaintiff, a United States citizen who was permanent resident of Canada subject to its laws while he lived within Canada, was not "subject" of Canada who could invoke diversity jurisdiction of federal district court to maintain civil action against citizen of Mississippi.

Affirmed.

1. Courts ⇐321

Plaintiff, a United States citizen who was permanent resident of Canada subject to its laws while he lived within its territory, was not "subject" of Canada who could invoke diversity jurisdiction of federal district court to maintain civil action against citizen of State of Mississippi under statute giving district courts original jurisdiction of civil actions where matter in controversy exceeds $10,000 and is between citizen of a state and foreign states or citizens or subjects thereof. 28 U.S.C.A. § 1332(a); U.S.C.A.Const. art. 3, § 2.

See publication Words and Phrases for other judicial constructions and definitions.

2. Constitutional Law ⇐70.1(7)

Congress is appropriate body to correct anomaly of federal jurisdiction whereby American citizen living abroad is precluded from invoking diversity jurisdiction of federal court, while foreign citizens having no connection with United States may do so. 28 U.S.C.A. § 1332(a); U.S.C.A.Const. art. 3, § 2.

Appeals from the United States District Court for the Northern District of Mississippi.

Before COLEMAN, GODBOLD and HILL, Circuit Judges.

JAMES C. HILL, Circuit Judge:

The sole question presented in this appeal is whether a United States citizen who is a permanent resident of Canada may invoke the diversity jurisdiction of a federal district court under 28 U.S.C. § 1332(a) to maintain a civil action against a citizen of the State of Mississippi. The plaintiff-appellant, Dr. Jean E. Smith, is a professor of political economy at the University of Toronto, Canada, and a novice in the cattle business. On January 24, 1974, Larry Carter, a Mississippi citizen, instituted a replevin action against Dr. Smith in Mississippi, seeking the recovery of 109 head of cattle previously sold to Dr. Smith, and for which Carter had not been paid. Claiming diversity of citizenship, on February 7, 1974, Dr. Smith sought and obtained a removal of the cause to the United States District Court for the Northern District of Mississippi. In addition, he

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subsequently brought a civil action against the appellee, Carter, in the same United States District Court, again claiming diversity of citizenship, and alleging fraudulent misrepresentation and concealment in the sale by defendant of diseased cattle.

The defendant-appellee answered Dr. Smith's complaint, denying fraud and asserting a counterclaim against plaintiff as to other cattle transactions between the parties. By order of May 30, 1974, the district court combined these two actions. Before trial, defendant moved to dismiss Dr. Smith's complaint on the ground that plaintiff was a United States citizen residing in Canada, was not a resident of any particular state of the United States, and that the requisite diversity of citizenship under 28 U.S.C. § 1332(a)(2) was lacking.

On April 9, 1974, after a hearing, Judge Keady granted defendant Carter's motion to dismiss for lack of diversity jurisdiction and certified his judgment for immediate appeal pursuant to 28 U.S.C. § 1292(b). On May 9, 1974, Judge Keady issued a further order in which he remanded the original replevin action to the Circuit Court of Chickasaw County, Mississippi. The district court, however, stayed the order of remand in the replevin case pending appeal to this court of the diversity question in Dr. Smith's companion case. Dr. Smith is appealing from both of Judge Keady's orders, and Carter cross-appeals only that portion of the order of May 9, 1975, which stays the remand of the replevin action pending appeal.

Appellant, Dr. Smith, is a United States citizen who resided in New Hampshire until 1965, when he moved to Toronto, Canada. In 1968, he achieved the academic rank of full professor with permanent tenure. In 1972, he became a "landed immigrant" of Canada, a necessary preliminary for becoming a Canadian citizen. Appellant's family resides with him in their family dwelling in Toronto and, although he is ineligible to vote in Canada, appellant has taken a active part in Canadian civic and political affairs.

I.

[1] Plaintiff's claim of diversity is based on Article III, Section 2, of the Constitution and 28 U.S.C. § 1332(a), the statutory implementation thereof. Article III, Section 2 authorizes federal jurisdiction in controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects," and § 1332(a) provides as follows:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000 . . . and is between . . . citizens of a State, and foreign states or citizens or subjects thereof.

Since appellant is neither a citizen of any particular state nor a citizen of Canada, he asserts that diversity jurisdiction exists on the basis of his status as a foreign subject. The district court was not persuaded by this contention, however, finding instead that the word "subject" did not establish a separate category, distinguishable from the "citizen" category, under which appellant could invoke diversity jurisdiction. The court held that the words "citizen" and "subject" have equivalent meanings, the only difference between them lying in the form of government under which a person lives. Under the district court's interpretation, those who live under and owe allegiance to a monarch are subjects and those who live under and owe allegiance to a republican government, such as the United States, are citizens. The court noted that:

> [W]hether or not there is basic wisdom or logic in the jurisdictional scheme, the Constitutional makers, our founding fathers, were once all subjects of King George III; immediately upon the Declaration of Independence they become citizens of their respective states; at the later formation of the United States Constitution, they also became citizens of the United States. The founding fathers were subjects of King George because he was the sovereign under the system of laws to which they owed allegiance. Only by the revolutionary change of government did they become citizens of the United States, when they swore fealty to the new sovereign, the United States Government and to the respective states of which they were residents.

The district court's interpretation of the term "subject" is fatal to appellant's cause of action; since he is not a Canadian citizen, under the district court's holding he cannot be a Canadian subject.[1] The holding of the district court is consistent with the long-standing rule set forth in *Van der Schelling v. U.S. News & World Report, Inc.*, 213 F.Supp. 756 (E.D.Pa.1963), *aff'd per curiam* 324 F.2d 956, (3d Cir. 1963), *cert. denied*, 377 U.S. 906, 84 S.Ct. 1166, 12 L.Ed.2d 177 (1964), that a United States citizen who is a permanent resident of a foreign country may not invoke federal diversity jurisdiction under 28 U.S.C. § 1332. Recognizing that *Van der Schelling* is the definitive authority on this subject, appellant urges this Court to depart from the interpretation adopted in Judge Lord's 1963 decision. The district court, however, carefully considered appellant's position and, after hearing oral argument, declined to disagree with *Van der Schelling*. We affirm.

II.

In support of his argument that the district court opinion should be reversed, appellant places great emphasis on historical differences in the usage of the terms "citizen" and "subject." Although these terms undoubtedly have been used in different contexts and with different shades of meaning over the years, we believe that the interpretation reached in *Van de Schelling* is accurate. Moreover, the usage set forth in other judicial interpretations is the most relevant authority for our purposes. In this respect, we conclude that the basic underpinnings of *Van der Schelling* and its progeny are sound.[2] In *Van der Schelling*, Judge Lord reviewed remarks of Alexander Hamilton contained in "The Federalist," No. 80, as well as statements made by

1. We note that appellant has attained "landed immigrant" status, which he has described as a necessary preliminary status for becoming a Canadian citizen. In this connection, we presume that appellant could become a Canadian citizen by meeting the appropriate requirements of the Canadian government. Appellant contends, however, that he need not attain "citizen" status to invoke the diversity jurisdiction of the federal courts, since, as a permanent resident of Canada, he is a Canadian "subject" as that term is used in the Constitution and 28 U.S.C. § 1332(a).

2. The district courts have consistently followed *Van der Schelling*: *Mohr v. Allen*, 407 F.Supp. 483, 487 (S.D.N.Y.1976); *Kaufman v. Gootrad*, 397 F.Supp. 1054, 1055 (S.D.N.Y. 1975); *Haggerty v. Pratt*, 372 F.Supp. 760, 761 (E.D.N.Y.1974); *Farner v. Gentzsch*, 355 F.Supp. 349, 353 (E.D.Penn.1972); *Milton E. Rayfield v. Watson Seafood & Poultry Co.*, 268 F.Supp. 97, 103 (E.D.N.C.1967); *Twentieth Century-Fox Film Corp. v. Taylor*, 239 F.Supp. 913, 914 (S.D.N.Y.1965) (dictum).

James Wilson in the debates in Pennsylvania concerning the adoption of the Constitution. From these he concluded:

> Two things are immediately apparent. First, both Hamilton and Wilson in discussing Article III, Section 2, refer to citizens, subjects and foreigners interchangeably. These references, it seems to me, are an equation, perhaps unconscious, in the minds of the framers that "citizen" and "subject" mean the same thing. Second, if the main purpose [of the diversity provision of Article III] was to provide a national forum with the object of preserving the peace, it seems hardly likely that a foreign sovereign or government would become martially exorcised over a wrong to a citizen of the United States who can go into his native courts as a native. 213 F.Supp. at 759 (footnote omitted).

Judge Lord also reviewed the legislative history of the Judiciary Act of 1789, which first implemented Article III of the Constitution, and concluded that the Constitutional provision did not cover American citizens domiciled abroad. He observed that the 1789 legislation provided federal access where the suit was between a citizen of the United States and *aliens*, a statutory designation which persisted until the Act was amended in 1875. Finding no reason to suppose that Congress deliberately failed to exercise a power given by the Constitution, he found an inference that those who stood close to the framing of the Constitution intended to exhaust the grant of federal jurisdiction. He deduced that the framers, by using the term "aliens," had embraced "citizens or subjects," as constitutionally used in Article III. We find no good reason to disagree with Judge Lord's conclusions.

[2] Appellant contends that *Van der Schelling* created an anomaly of federal jurisdiction which should be corrected by this court. Under the present rule, an American citizen living abroad is precluded from invoking the diversity jurisdiction of the federal courts, while foreign citizens having no connection with the United States may do so. Of the *Van der Schelling* rule, Professor Moore has stated:

> . . . [I]t does appear anomalous that aliens may invoke federal jurisdiction against state citizens, but not against United States citizens who are not citizens of a state; and that United States citizens who are not domiciliaries of the same state as their adversary, nor of any other state, may not avail themselves of the protection and benefits of the federal courts, at least on the basis of diversity jurisdiction.[3]

We too recognize the anomaly of the existing rule under *Van der Schelling*, but we concur with Professor Moore's suggestion that Congress is the appropriate body to make such a change.[4]

We are especially reluctant to reverse an existing interpretation which has remained unchanged for over 12 years. We note that during this period Congress has not seen fit to amend Section 1332(a) in the manner suggested. More-

3. 1 J. Moore, Federal Practice ¶ .74[4], at 708.4 (2d ed. 1948).

4. After many years, a similar anomaly was corrected when Congress decreed that "States" "includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico," thus permitting domiciliaries of such areas, for purposes of diversity jurisdiction, to sue or be sued on the same basis as citizens of a state. It may be that subjects can be validly defined by Congress to include United States citizens who are domiciled in a foreign country. *Id.* (footnote omitted).

over, the American Law Institute, in its study of federal and State court jurisdiction, has not recommended the change sought by appellants in this case.[5]

III.

In conclusion, we wish to remark briefly on appellant's argument that the interpretation of the district court (*i. e.*, that citizens live in republics and subjects in monarchies) lacks semantic precision. We are persuaded by appellee's argument that the term "subject to" is significantly different in meaning from "subject of." It is readily apparent that appellant, as a resident alien, is *subject to* the laws of Canada while he lives within its territory and enjoys the benefits of its government. Nonetheless, since he has neither renounced his United States citizenship nor applied for citizenship in Canada, he is not a *subject of* Canada.

In addition to the diversity question raised in this appeal, appellee cross-appeals that portion of the district court's order which undertook to stay the remand of the replevin action pending appeal. In view of our decision on the diversity question, however, we find it unnecessary to determine whether such an order was available to the district court.

AFFIRMED.

5. See ALI, Study of the Division of Jurisdiction Between State and Federal Courts 111-12 (1969) *noted in Haggerty v. Pratt Institute*, 372 F.Supp. 760, 762 n. 4 (E.D.N.Y.1974).

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Petition for a Writ of Certiorari on Armis E. Hawkins, attorney for the respondent, on April 12, 1977, by mailing to said attorney two correct copies thereof, certified by me as such, contained in a sealed envelope with postage prepaid, addressed to said attorney at his regular office address, to-wit: P. O. Box 266, Houston, Mississippi, 38851, and deposited in the post office at Portland, Oregon, on said date.

DATED: April 12, 1977.

Norman Sepenuk
Of Attorneys for Petitioner